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# In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. —

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

EXQUISITE FORM BRASSIERE, INC.

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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The Federal Trade Commission prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which remanded this case to the Federal Trade Commission for the purpose of affording Exquisite Form Brassiere, Inc., an opportunity to present an affirmative defense under Section 2(b) of the amended Clayton Act.

## OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 12–26) has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1962 (Appendix B, *infra*, pp. 27–30). The time for filing a petition for a writ of certiorari

was extended by order of Mr. Chief Justice Warren on February 20, 1962, to and including March 22, 1962, and again on March 16, 1962, to and including April 20, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the good faith meeting of competition defense under Section 2(b) of the amended Clayton Act, which is available to sellers as a justification for their price and service discriminations otherwise unlawful under Sections 2(a) and 2(c) of that Act, is also available as a defense to a charge of discriminatory payments for promotional services in violation of Section 2(d) of the Act.

## STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen

competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * * *

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by

such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

* * * * *

**STATEMENT**

Section 2(a) of the Robinson-Patman Act prohibits price discriminations, the effect of which "may be substantially to lessen competition or tend to create a monopoly." Section 2(b) of this Act provides that "discriminations in price or facilities furnished" may be rebutted by a "seller * * * showing that his lower price or the *furnishing of services or facilities* * * * was made in good faith to meet an equally low price of a competitor, or the *services or facilities furnished by a competitor.*" [Emphasis supplied.] Section 2(d) makes it unlawful for a seller to pay a "customer" for his furnishing of services or facilities unless such payments are available to competing customers on proportionally equal terms. Section 2(e) prohibits a seller from *furnishing services or*

*facilities* to some purchasers without making the same proportionally available to competing purchasers.

The initial complaint issued by the Federal Trade Commission against Exquisite Form Brassiere, Inc., charged a violation of Section 2(d) of the Robinson-Patman Act in connection with Exquisite's operation of a cooperative advertising plan. Under the terms of this plan Exquisite agreed to pay a percentage of the net costs of advertising devoted to its products which were placed by the customer in certain approved new papers. The percentage that Exquisite was to pay varied and was determined by the number of such advertisements appearing during a specified period of time; and the percentages thus determined were paid by means of credit memoranda, applicable to current and future invoices (J.A.[1] pp. 5–7). The charged violation was brought under Section 2(d) of the statute since the gravamen of the offense was Exquisite's compensating a customer for promotional services he performed. The Court of Appeals upheld the Commission's findings that Exquisite had not made its advertising allowances available to all competing customers on proportionally equal terms.

During the course of the proceedings before the hearing examiner, evidence was developed with reference to a practice of Exquisite with respect to so-called "stylists." These "stylists" were female employees who aided the personnel of retail merchants in displaying, fitting and selling Exquisite products. These stylists were paid by Exquisite and

[1] "J.A." refers to the joint appendix in the Court of Appeals.

worked at the retail places of business on assignment. Since the initial complaint's allegations were confined to violation of Section 2(d) and did not relate to the seller's providing the promotional services, a motion was made to amend the complaint. This motion was granted by the Commission, and a second count was added to the complaint which charged that Exquisite had violated subsection (e) of the statute in that it was furnishing the services of stylists to some purchasers without offering the same services on proportionally equal terms to competing purchasers (J.A. pp. 7–8).

Exquisite thereafter interposed the good faith meeting of competition defense to both counts of the complaint. The hearing examiner and the Commission permitted the 2(b) proviso to be introduced defensively to the added 2(e) count of the complaint, but found that it was not legally available as a defense to Count I of the complaint, which alleged violation of subsection (d). The availability of the 2(b) defense to this 2(d) charge is the issue of contention.

In its opinion upholding the findings of the hearing examiner that the 2(b) defense is not available to a charge of violation of subsection (d) (J.A. pp. 35–39), the Commission relied on the literal language of Section 2(b) which refers only to a seller's lower price or his furnishing of services or facilities, as distinguished from a seller's payment to a customer for providing promotional services.

The Commission regarded each of the subsections of the Act as unique and severable and held that no

reason suggested itself why the limitations and provisions relating to one subsection should be read into those relating to the other.[2] The Commission concluded that "since the specific language of Section 2(b) refers only to practices covered by Subsections (a) and (c), we must therefore reject the argument that the subsection must also logically apply to Section 2(d)" (J.A. p. 39).

Commissioner Tait dissented from the majority's view, concluding that "Sections 2(d) and 2(c) should be interpreted to reconcile their basic purpose," and that he could "see no reason why a distinction should be made between these twins of the Robinson-Patman Act" (J.A. p. 46).

The Court of Appeals for the District of Columbia Circuit, in a unanimous opinion by Judge Prettyman, has indicated its agreement with Commissioner Tait's dissent, and reiterates his conclusion that the Commission erred in its interpretation of the statute. While recognizing that "if subsection (b) is read quite literally, the language of the statute appears to support the view of the Commission," the court went on to state that:

> The economic evil sought to be outlawed by [the statute] is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as

[2] *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *reh. denied*, 309 U.S. 694; *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 767 (4th Cir. 1939).

> discrimination is practiced. Congress was here dealing with a fundamental economic concept; it was not shadowboxing or indulging in fine semantic shadings. It is impossible to believe it meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination. [*Infra*, p. 18.]

The court, in referring to previous interpretations of these subsections, observed that:

> The Commission first reached its view of the meaning of this statute in 1956 in *Henry Rosenfeld, Inc.* [52 F.T.C. 1535], and reaffirmed it in 1957 in *J. H. Filbert, Inc.* [54 F.T.C. 359], and again in *Admiral Corporation* [55 F.T.C. 2078 (1959)]. Its decision in the case at bar was in October, 1960, and the Commission followed the same view in July, 1961, in *Shulton, Inc.* [3 Trade Reg. Rep. 15,323]. We find ourselves in agreement with Commissioner Tait, who dissented in the present case, and with Commissioners Kern and Elman, who dissented in *Shulton, Inc.*, and with the United States District Court for the Southern District of Florida in *Delmar Construction Co. v. Westinghouse Electric Corp.*, decided February 24, 1961 [Trade Reg. Rep. 69,947]. (*Infra*, pp. 25–26.)

The case was accordingly remanded to the Commission for the purpose of reopening the proceedings "to afford our petitioner an opportunity to present, if it be so advised, a defense under Section 2(b) of the statute to the charges contained in Count I of the complaint, by showing that its furnishing of services

or facilities to some purchaser or purchasers was in good faith to meet the services or facilities furnished by a competitor." (*Infra*, p. 26.)

## REASONS FOR GRANTING THE WRIT

The Court of Appeals, by its remand, has made the good faith meeting of competition defense under Section 2(b) available to a seller who is charged with having discriminated between its customers in violation of Section 2(d) of the Robinson-Patman Act. By its decision, the court has decided an important and far-reaching question of Federal law, not yet settled by this Honorable Court, which will continue to recur until finally adjudicated. With due deference to the contrary view of the Court of Appeals, a majority of its present membership believes that the Commission's interpretation of Section 2(d) is correct and intends to adhere to it unless and until this Court or Congress should determine that the Commission's interpretation is wrong. As this Court has frequently stated, a denial of certiorari is not an adjudication on the merits. Accordingly, a majority of the Commission as now constituted will not abandon what it believes to be a proper interpretation of Section 2(d) if review here should not be granted.

The administrative hiatus resulting from the Court of Appeals' ruling can readily be seen by comparatively referring to the number of cases which will be affected by the disparity in rulings between the Commission and the court. For example, during the 1958–61 fiscal years eighty-two (82) Federal Trade

Commission proceedings resulted in cease and desist orders being issued against respondents under Section 2(d), while only eight (8) orders were issued under Section 2(e) in the same period. Also, a number of cases are now pending before the Commission, in various postures, which directly involve this issue and will necessarily be presented to the Commission in the near future for decision. It therefore is becoming increasingly important to test the correctness of the Commission's holding, over a six-year period, that the 2(b) defense is not legally available where the charge is violation of Section 2(d) of the amended Clayton Act.

The dilemma facing respondents and hearing examiners in proceedings before the Federal Trade Commission is also a matter deserving serious consideration. Federal Trade Commission hearing examiners are necessarily bound by the ruling of the Commission, despite the court's contrary holding that the defense may be interposed to a charge of violation of Section 2(d). Respondents' only recourse, therefore, after appeal to the Commission, is to the Courts of Appeals, where the issue may or may not have been adjudicated.[2] Assuming, *arguendo*, that the respondent is successful in a particular circuit, it is still faced with the necessity of re-presenting the Section 2(b) defense to the hearing examiner and the Commission, on remand, which is at best a cumbersome procedure.

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[2] For example, this same issue is currently pending in the Court of Appeals for the 7th Circuit in *Shakton, Inc.*, 3 Trade Reg. Rep. 15,323, 7th Cir. No. 13,508, the case having been argued April 13, 1962.

The Commission feels that this protracted and continuing litigation can only be obviated by a final definitive ruling by this honorable Court.

The question presented by this petition is a difficult one, reflecting as it does an inquiry into what Congress intended in enacting the statute. The Commission feels that these varying statutory interpretations should be finally resolved and strongly urges this honorable Court to lay this controversial issue to rest.

## CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES McI. HENDERSON,
*General Counsel,*

J. B. TRULY,
*Assistant General Counsel,*

WILLIAM A. BAILEY,
*Assistant to the General Counsel,*
*Federal Trade Commission.*

APRIL 1962.

The Solicitor General has authorized the filing of this petition without joining therein.

ARCHIBALD COX,
*Solicitor General.*

# APPENDIX A

(Federal Trade Commission Docket 6966)

United States Court of Appeals for the District of Columbia Circuit

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No. 16123

EXQUISITE FORM BRASSIERE, INC., A CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

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*ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION*

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Decided November 22, 1961

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*Mr. Peyton Ford* for petitioner. *Mr. David M. Phelan* also entered an appearance for petitioner.

*Mr. James McI. Henderson*, General Counsel, Federal Trade Commission, with whom *Mr. Alan B. Hobbies*, Assistant General Counsel, Federal Trade Commission, at the time the brief was filed, was on the brief, for respondent.

Before PRETTYMAN, BASTIAN and BURGER, *Circuit Judges*.

PRETTYMAN, *Circuit Judge*: This is a petition to review an order of the Federal Trade Commission.

Petitioner, which we shall call "Exquisite", is engaged in the manufacture, sale and distribution of brassieres. It sells to department stores, women's specialty stores, and dress shops. In the course of its business it maintained a system of promotional allowances. The Commission found that in certain respects its practices in making these allowances were in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.[1] Subsections (d) and (e) of that Section are the pertinent provisions.

Subsection (d) provides in essence that it shall be unlawful for a merchandiser to pay anything of value to a customer for any services or facilities furnished by the customer in connection with the resale of the product; unless such payment is available on proportionally equal terms to all competing customers. This provision contemplates that the customer of a manufacturer may render services in connection with the resale of the product, such, for example, as advertising the product, and the manufacturer pays the bill or a portion of it. The statute says this practice is unlawful unless available to all competing customers. The other subsection (Subsection (e)) provides in essence that it shall

[1] 49 Stat. 1526 (1936), 15 U.S.C. § 13.

The full text is: "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

be unlawful for a merchandiser to furnish any services or facilities connected with the resale of a commodity sold by him, upon terms not accorded all purchasers on proportionally equal terms. This section contemplates that a manufacturer may furnish free to his customers services, such as trained sales personnel, to facilitate resales. The statute provides that this practice is unlawful unless available to all customers on proportionally equal terms.

The difference between the two subsections is that in the former ((d)) the customer supplies the services or facilities and his vendor pays the bill, and in the latter ((e)) the wholesale vendor himself supplies the services and facilities for the use of his customer in facilitating resales.

The complaint against Exquisite, as originally filed before the Commission, charged a violation of Subsection (d) in the operation of a cooperative advertising plan. In this plan Exquisite offered allowances against future purchases for amounts spent by customers for advertising in which the name of an Exquisite product was prominently displayed. The minimum space to be devoted to this product in order to receive an allowance was specified. As an auxiliary plan, for those who did not wish to participate in the cooperative advertising plan, Exquisite operated a "premium plan". Coupons went with purchases in this plan, and the coupons were exchangeable for pre-

[3] The full text is: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

miums in goods of various sorts. The charge was that Exquisite did not make these advertising allowances or premiums available to all competing customers upon proportionally equal terms. The examiner and the Commission found the charge proven.

The first point upon the appeal is that the conclusion of the Commission is not supported by substantial evidence on the record as a whole. Several witnesses testified they were owners, officers or employees of companies selling Exquisite products, and that their companies had not been offered these allowances; two of petitioner's officers testified to the same effect in respect to the practice. Exquisite says the practice was well known and was announced in trade journals. But the only references given us to the latter in the record are three publications of an announcement in February, 1956, that Exquisite would help customers defray production costs of cooperative advertising. It seems to us that the evidence presented by Exquisite was not sufficient to offset the clear content of that presented by the Commission staff. The conclusion reached by the Commission remains supported by substantial evidence on the record as a whole.

The second point made by Exquisite is posed by the following facts. During the course of the hearing on the complaint as originally filed, evidence was presented with reference to a practice of Exquisite in respect to "stylists". These were female employees who aided the personnel of retail merchants in displaying, fitting and selling Exquisite products. These "stylists" were paid by Exquisite and worked at the retail places of business upon assignment. When this evidence appeared, counsel supporting the complaint announced that he might move for amendment of the complaint. When he completed his case on the charge as originally posed and before any defense had

been begun, he did move to amend and the motion was granted. A second count was thus added to the complaint. It charged that Exquisite had violated Subsection (e) of the statute in furnishing to some purchasers the services of "stylists" without offering the same services on proportionally equal terms to competing purchasers.

Exquisite asserts error in the granting of the motion to amend. We find none. Ample time was given for preparation of a defense, thirty days being given for answer and almost another ninety days before hearing was held. Amendments to conform pleadings to proof are commonplace in judicial proceedings, and the action here, in an adjudicatory, or quasi-judicial, proceeding, was of that general character. All procedural safeguards were afforded in ample measure; were this not so, a remand might be in order.

Next, Exquisite contends the allegations of the second count (*i.e.*, the addendum by amendment), concerning the furnishing of "stylists", were not substantiated by the record as a whole. The point involves, in part, a problem of credibility. We must leave that to the examiner and the Commission. There is substantial support for the view they took. An official of Exquisite testified at one stage quite clearly that the five or six stylists were allocated on an equal time basis among the ten or twelve districts, into which the Company had divided the country, and were used by the district managers for promotional purposes as they saw fit. This official testified quite differently later on. We think the Commission's finding is sufficiently supported. The same observation applies to the defense proffered by Exquisite to the effect that the stylists were used only to meet competition.

The point of general interest upon this appeal is whether a defense of meeting competition in good faith, described in the proviso in Subsection (b) of the statute, is available in response to a charge of violating Subsection (d). All parties seem to agree that the defense thus described is available in response to charges under Subsections (a) and (e). Is it available to a person charged under Subsection (d)? Such a defense was offered and received in respect to the Subsection (e) count, Count II of the complaint, but when proffered on Count I, the Subsection (d) count, it was rejected. The parties agree that no court has yet passed directly on this question.

The full text of Subsection (b) is in the margin.* The critical words used in the proviso are "the furnishing of services or facilities to any purchaser". These are the words which appear in Subsection (e). The words in Subsection (d) are "to pay * * * *to*, * * * a customer * * * *as compensation* * * * for any services or facilities *furnished by* * * * such customer". [Emphasis added.] While "services or facilities" are the subject of both subsections, in the one case ((e)) the vendor furnishes them *to* the customer; in the other they are furnished *by* the cus-

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*"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

tomer and the vendor reimburses him. So that, if careful note is taken of the difference between Subsections (d) and (e), and if Subsection (b) is read quite literally, the language of the statute appears to support the view of the Commission. That is, read thus the statute says that a person can meet competition by directly supplying some but not all customers with services and facilities with which to promote sales, but he cannot meet competition by reimbursing some but not all of his customers for services or facilities they procure in the first place. We think this is an unrealistic reading of the statute.

We first note the substance of the subject matter of this statute. The economic evil sought to be outlawed by it is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced. Congress was here dealing with a fundamental economic concept: it was not shadowboxing or indulging in fine semantic shadings. It is impossible to believe it meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination. The substance of the problem dealt with by this statute precludes such a construction in the absence of unmistakable evidence to that effect.

Indeed, as the Eighth Circuit pointed out in the *Elizabeth Arden* case,[3] a seller who makes discriminatory payments of compensation to a customer for demonstrator services provided by the customer's employee might be regarded alternatively as having violated Subsection (e) "by contributing to the furnishing of, any services or facilities", *or*, as having violated Subsection (d) by making discriminatory

[3] *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, 150 F. 2d 988, *cert. denied*, 326 U.S. 773 (1945).

payments of compensation for services or facilities furnished by the customer. It is not necessary to do so, but Subsection (e) might well be viewed as an extra precautionary measure inserted by the Congress to make sure its basic purposes were not narrowly construed. The thrust of the Robinson-Patman Act is against discrimination.

We now examine the language of the Statute. Subsections (a) and (e) proscribe, in words, discriminations: "[i]t shall be unlawful * * * to discriminate". The word "discriminate" does not appear in Subsection (d), but discrimination is the action declared unlawful in that subsection just as clearly as if the word had been used. That Subsection (d) declares it to be unlawful to compensate a customer for services or facilities furnished by him, "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." If the compensation is available to all competing customers upon proportionally equal terms, there is no violation of this law no matter how much such compensation is paid. The discrimination makes the illegality. The Commission makes the flat statement in its brief here that Subsection (d) does not proscribe discriminations in services or facilities. We are wholly unable to agree with that view.

Subsection (b) is a procedural provision. Its chief clause begins, "Upon proof being made * * * that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged * * *." The language of this basic clause is "services or facilities furnished"; it does not say either "to" or "by". There can be no quibble about the reality that services or

facilities are furnished by a vendor whether they are supplied in kind or are acquired by the customer with subsequent reimbursement by the vendor. Neither can there be any quibble about the reality of a discrimination in either event. Whatever the dispute may be about semantics, the realities are crystal-clear. Obviously, it seems to us, this basic clause, as a matter of reality and without semantic difficulty, includes discrimination in the furnishing of service or facilities no matter how furnished. Surely it was not intended by this section to shift the burden when proof is made that services and facilities have been furnished directly to some customers only, but not if they have been furnished indirectly.

Then the clause proceeds: when such proof has been made, the person charged may show "justification", and the justification thus shown is for the purpose of "rebutting the prima-facie case thus made". If the prima-facie case may involve either direct or indirect furnishing, the rebuttal justification obviously may be of either. So it seems clear to us that the basic clause in (b) means that justification can be shown in response to proof of either a direct or an indirect discrimination in furnishing services or facilities.

We come, then, to the proviso. It begins with a reference to "the prima-facie case thus made". This, as our discussion above concludes, means discrimination by either direct or indirect furnishing of services or facilities. It refers to the seller's "rebutting" the prima-facie case thus made. Then comes the phrase which is the nub of the controversy. The proviso says that the seller's rebuttal can be made by showing that "the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet * * * the services or facilities furnished by a competitor." The Commission says the phrase "to

any purchaser" means furnishing in kind; it does not include furnishing by reimbursement to a customer for services or facilities initially supplied by him. Support for that view is found in the fact, as we have pointed out, that a dichotomy is indicated by the difference in wording between Subsection (d) and Subsection (e)—the former dealing with indirect furnishing of services or facilities and the latter with direct furnishing. Since Congress thus established a difference, says the Commission, and since in the proviso in Subsection (b), making available the meet-competition defense, Congress distinctly used the language of Subsection (e), it must be understood as intentionally precluding the defense for practices described in Subsection (d). We think such an intent cannot be gleaned from so literal a reading of this one phrase in this statute without any other indication of such an intent on the part of the Congress. We cannot read this phrase, "furnishing * * * to any purchaser"—indeed the one word "to"—as making Subsection (b) mean that upon proof being made that there has been discrimination in services or facilities furnished customers, no matter how furnished, *i.e.*, directly or indirectly, the person charged may rebut the prima-facie case thus made by showing justification, and such rebuttal may consist of a good faith effort to meet competition if the services or facilities were furnished directly in kind to customers but not if they were furnished indirectly by the process of reimbursement or allowance. Such a reading would, as we have already said, be unrealistic in our view. It seems to us the realistic view is that Congress meant the defense to be available to meet the prima-facie case made, *i.e.*, the discrimination in furnishing services or facilities.

Both Exquisite and the Commission refer to the legislative history of the statute. We find there some material which is interesting and helpful, but we are unable to discern any dispositive matter. Numerous bills were introduced on the general subject, but the principal bills were identical ones introduced in the House and Senate, H.R. 8442 on June 11, 1935, and S. 3154 on June 26, 1935. Neither contained equivalents of Subsections (b) or (c); both contained substantially Subsection (d). The bill as reported to the Senate (S. Rep. 1502) on calendar day February 3, 1936, contained no changes pertinent to the present controversy. On April 30th the Senate passed the bill, as reported to it, after amending it on the floor. One amendment adopted on the floor of the Senate, offered by Senators Borah and Van Nuys, made it unlawful for any person to be a party to a sale "which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, *allowance*, or *advertising service charge* is granted to the purchaser" over and above such granted to said competitors. [Emphasis ours.] Senator Borah told the Senate: "The matter which we propose to prohibit that [*sic*] of allowing discount or rebate or allowance for advertising service charge to one purchaser without making it available to each and every other purchaser." This amendment would appear to be redundant to Subsection (d), already in the bill, but several Senators said the final statute would really be written in conference. And in fact this amendatory provision was omitted by the conference. The incident of this amendment, like many other phases of the debate, is indicative of the mood of the Senate and the broad sweep of its purposes and consideration.

The other amendment adopted on the floor of the Senate, offered by Senator Moore, was to add a subsection identical to present Subsection (b). Thus, as the bill passed the Senate on April 30, 1936, it included (1) our present Subsection (d), making it unlawful to pay anything to a customer as compensation "for any services or facilities furnished by or through such customer" unless offered to all competing customers; (2) a separate subsection making unlawful any discrimination in discounts, rebates, allowances, or advertising service charges; and (3) the meet-competition defense applied to "the furnishing of services or facilities to any purchaser". The bill then contained no Subsection (c) or any equivalent thereof. Thus there can be no doubt whatsoever that, so far as the Senate was concerned, the proviso in Subsection (b) applied to discriminations in compensation or allowances made to customers for services or facilities furnished by them, as now provided in Subsection (d); there was nothing else in the bill for this language to apply to. The bill thus passed went to the House.

In the meantime, on March 31, 1936, the House bill (H.R. 8442) had been reported (H.R. Rep. 2287). As thus reported, it contained Subsection (d), Subsection (e), and a subsection which contained a meet-competition defense in respect to price discrimination only, saying nothing about services or facilities. On June 2nd the House ordered its bill printed, with the Senate bill substituted as its text. Thus the bill as it passed the Senate became H.R. 8442 on the calendar of the House. The House committee proposed its own bill as an amendment. Then the committee offered amendments to this amendment. One such amendment thus offered and adopted on the floor was to change the subsection dealing with the burden

of proof and the meet-competition defense to read as Subsection (b) now reads. The sole explanation made to the House in respect to it was this one sentence: "It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished." Thus, so far as the House is concerned, it clearly appears that the Members understood the defense permitted by the subsection they were enacting applied to competition in "services and facilities furnished"; no limiting words as to manner of furnishing and no differences drawn on that score. As Senators had foretold, the final statute was written in conference and was enacted as we now have it. Since the subsection now (b) was the same in both Senate and House bills, nothing happened to it in conference.

Misfits in words or phrases are not infrequently encountered when bills have been amended in the midst of debate on the floor of one or the other of the Houses of Congress. This statute was amended on the floors of both Houses. It is not surprising that the final product is not perfectly meshed, as it might have been had it come undisturbed from the drafting board of a skilled draftsman.

We find nothing in the legislative history to indicate that the Congress had in mind a rigid limitation of its use of the word "to" in this Subsection (b) or that it here intended to deal with anything less than the furnishing of services or facilities with no critical selection of process by which a discrimination in furnishing services or facilities may be accomplished.

The Commission argues to us that Subsection (d) was aimed at sham transactions. If so, the statute contains no hint of such limitation. The statute outlaws discrimination in payments of anything of value

as compensation for services furnished by the customer, whether the payments are open and notorious or secret and camouflaged. Despite its argument, we doubt that the Commission would go so far as to hold guiltless one who openly and notoriously paid compensation to some customers but not to all competing concerns.

The examiner was of the view that "It is now well settled that the good faith meeting of competition defense set forth in Section 2(b) is not applicable to Section 2(d)." He cited *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959). The Commission was of the same view, but agrees in its brief here that no court has yet passed directly on this question. We do not find in the *Simplicity Pattern* case the holding or the reasoning which the Commission deems dispositive in principle in the case at bar. The Court was there concerned with a violation of Subsection (c), and the questions were whether absence of competition precluded a violation of that section; and whether lack of competitive injury likewise precluded violation. The case did not concern the problem we have here. It dealt with neither Subsection (d) nor the meet-competition defense. Apparently the Commission told the Supreme Court in its brief that this question was not in that case.

The Commission first reached its view of the meaning of this statute in 1956 in *Henry Rosenfeld, Inc.*,[6] and reaffirmed it in 1957 in *J. H. Filbert, Inc.*,[7] and again in *Admiral Corporation*.[8] Its decision in the case at bar was in October, 1960, and the Commission followed the same view in July, 1961, in *Shulton, Inc.*[9]

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[6] 52 F.T.C. 1535.

[7] 54 F.T.C. 359.

[8] 55 F.T.C. 2078 (1959).

[9] 3 Trade Reg. Rep. ¶15,323.

We find ourselves in agreement with Commissioner Tait, who dissented in the present case, and with Commissioners Kern and Elman, who dissented in *Shulton, Inc.*, and with the United States District Court for the Southern District of Florida in *Delmar Construction Co.* v. *Westinghouse Electric Corp.*, decided February 24, 1961.[10]

We have discussed at such great length the problem posed in this case because of the great weight we attach to the view of the Commission in respect to the meaning of the statute it is charged with enforcing.[11] We would not lightly reject that view. We reject it now only because upon the most careful consideration we are of firm conviction that view is untenable.

The case will be remanded to the Commission to afford our petitioner an opportunity to present, if it be so advised, a defense under Section 2(b) of the statute to the charges contained in Count I of the complaint, by showing that its furnishing of services or facilities to some purchaser or purchasers was in good faith to meet the services or facilities furnished by a competitor. In all other respects the findings and conclusions of the Commission are affirmed.

*So ordered.*

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[10] Trade Reg. Rep. ¶69,947 (S.D. Fla.).

[11] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944).

## APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

September Term, 1961.

No. 16,423

EXQUISITE FORM BRASSIERE, INC., A CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

*ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION*

Before PRETTYMAN, BASTIAN and BURGER, *Circuit Judges.*

*Judgment*

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court:

(1) that order of the Federal Trade Commission on review in this case in so far as it adopts paragraph numbered 2 of the order proposed by the hearing examiner in his initial decision dated January 27, 1960, is hereby affirmed and will be enforced; and, pursuant to the provisions of Rule 38(1) of this court, the Commission within ten days shall serve and file

a proposed enforcement decree consistent with the opinion and judgment of this court; and

(2) that in so far as the order of the Commission adopts paragraph numbered 1 of the order proposed by the hearing examiner in his initial decision dated January 27, 1960, it is hereby set aside, and the case is remanded to the Commission for further proceedings not inconsistent with the opinion of this court.

*Per Circuit Judge Prettyman.*

Dated: November 22, 1961.

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United States Court of Appeals for the District of Columbia Circuit

September Term, 1961

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No. 16123

EXQUISITE FORM BRASSIERE, INC., A CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

United States Court of Appeals for the District of Columbia Circuit. Filed February 2, 1962, JOSEPH W. STEWART, *Clerk.*

*Final decree affirming and enforcing paragraph 2 of the order to cease and desist, vacating and setting aside paragraph 1 of the said order and remanding the case to the Commission for further proceedings*

Exquisite Form Brassiere, Inc., a corporation, having filed in this Court on December 22, 1960, a petition to review and set aside an order to cease

and desist issued against it on October 31, 1960, by the Federal Trade Commission, respondent, in a proceeding before it entitled "In the Matter of *Exquisite Form Brassiere, Inc.*, a corporation, Docket 6966"; and a copy of said petition having been served upon the Commission, and the Commission having thereafter certified and filed in this Court, as required by the Clayton Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on September 26, 1961, and this Court having thereafter fully considered the matter and having rendered its decision on November 22, 1961, in which it (1) directed the affirmance and enforcement of the Commission's order insofar as Paragraph 2 of the order to cease and desist be, and it hereby is, enforced, and that petitioner be, and it hereby is, ordered to obey and comply with the terms thereof; and

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that to the extent that the prayer of the petition to set aside and vacate the order of the Commission relates to Paragraph 2 of the order of the hearing examiner as adopted by the Commission, the petition be, and it hereby is, denied; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that it adopts paragraph numbered 2 of the order proposed by the hearing examiner in his initial decision dated January 27, 1960, issued under Section 2(e) of the Clayton Act; and (2) set aside the Commission's order insofar as it adopts paragraph numbered 1 of the order proposed by the hearing examiner in his initial decision dated January 27, 1960, issued under Section 2(d) of the Clayton Act and remanded the case to the Commission to permit

the presentation of the defense embodied in the proviso to Section 2(b) of the Act;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that to the extent that the prayer of the petition to set aside and vacate the order of the Commission relates to Paragraph 1 of the order of the hearing examiner as adopted by the Commission, the petition be, and it hereby is, granted, and Paragraph 1 of the order be, and it hereby is, vacated and set aside; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that this cause be remanded to the Federal Trade Commission for the purpose of reopening the proceeding and affording petitioner an opportunity to present a defense under the proviso to Section 2(b) of the Act, to Count I of the Commission's complaint, by showing that its furnishing of services or facilities to some purchaser or purchasers was in good faith to meet the services or facilities furnished by a competitor.

By the Court:

(S) E. BARRETT PRETTYMAN,
(S) WALTER M. BASTIAN,
(S) WARREN E. BURGER,
*United States Circuit Judges.*

Entered: February 2, 1962.